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Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5731

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIE DAVIS BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the prosecutor's use of peremptory challenges to excuse two black jurors violated petitioner's Sixth Amendment right to an impartial jury.

2. Whether the district court properly admitted evidence of petitioner's prior drug-related arrest.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-7A) is reported at 770 F.2d 912.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1985. A petition for rehearing was denied on September 12, 1985 (Pet. App. 1C). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of conspiracy to possess marijuana and cocaine with intent to distribute, in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1A-7A).

1. The evidence at trial showed that petitioner supplied drugs from his home in Florida for distribution in Oklahoma. Several co-conspirators testified concerning his drug dealing.

In particular, the co-conspirators testified that petitioner had supplied large quantities of marijuana that were seized in Florida while in transit to Oklahoma (Pet. App. 2A-3A). The evidence also included testimony from a Florida deputy sheriff who described his previous arrest of petitioner in 1980. In that incident, petitioner was arrested at a Florida airport after giving a suitcase containing seventeen pounds of marijuana to another person (id. at 3A-4A).

2. Petitioner and a co-defendant, Samuel Ponder, are black. At trial Ponder was represented at trial by E. Melvin Porter, a black member of the Oklahoma State Senate. During the jury voir dire the prosecutor used one of his six peremptory challenges to excuse a black juror and one of his two alternate challenges to excuse a black alternate juror (Pet. App. 19D). As a result, no black jurors served on petitioner's jury (id. at 3A). It was later revealed that during the second day of jury selection, before additional veniremen were summoned, the prosecutor stated to the jury clerk that "we would like to have as few black jurors as possible" (ibid.). The jury clerk took no action in response to this statement (ibid.).

The district court questioned the jury clerk in chambers concerning this incident and later held a hearing (Pet. App. 1D-72D). The prosecutor testified that he had asked the jury clerk how many blacks would be called as additional veniremen but had not intended to influence the jury clerk's selection of the potential jurors (Pet. App. 19D). The prosecutor explained that based upon personal experience, he considered Senator Porter a gifted attorney who had a special appeal to blacks in the community (Pet. App. 20D). The prosecutor planned to excuse blacks who knew or had heard of Senator Porter (ibid.). The district court concluded that the prosecutor's contact with the jury clerk, while raising serious questions of potential impropriety, did not affect the integrity of the jury selection process (id. at 62D).

3. The court of appeals, in affirming the conviction, rejected petitioner's contention that the prosecutor's use of peremptory challenges and his contact with the jury clerk violated petitioner's right to an impartial jury. The court concluded that the prosecutor's use of peremptory challenges did not result in a systematic exclusion of blacks from petit jury service. Relying on Swain v. Alabama, 380 U.S. 202 (1965), it reasoned that the prosecutor's use of peremptory challenges in this case did not establish a systematic practice of excluding blacks in "case after case" (Pet. App. 5A). The court condemned the prosecutor's contact with the clerk but concluded that since the clerk disregarded the prosecutor's statement, the contact could not have influenced the jury selection process (id. at 5A-6A). 1/ Finally, the court ruled that the government testimony concerning petitioner's prior arrest was admissible under Fed. R. Evid. 404(b) for the purpose of showing a plan, common scheme, or motive (Pet. App. 4A-5A).

ARGUMENT

1. Petitioner challenges (Pet. 4-13) the court of appeals' conclusion that a defendant must demonstrate a systematic exclusion of blacks from petit juries in order to establish racial discrimination in the exercise of peremptory challenges. This Court is presently considering that issue in Batson v. Kentucky, No. 84-6263 (argued Dec. 12, 1985). This case, involving the exercise of peremptory challenges in response to the particular notoriety of a defense attorney in the black community, is factually distinguishable from Batson. The Court

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1/ In rejecting petitioner's argument concerning the prosecutor's contact with the jury clerk, the court of appeals stated that the district court thoroughly explained the matter to the jury (Pet. App. 8A). Petitioner notes "as an aside and before argument" (Pet. 6) that the district court did not so advise the jury. The United States Attorney's Office has confirmed that the court of appeals' statement is incorrect. The court apparently meant that the district court had explained this issue to counsel. There was, of course, no reason to discuss this matter with the jury.

may nevertheless wish to hold this petition pending resolution of that case. Petitioner's alternative suggestion that the prosecutor's contact with the jury clerk resulted in reversible error is, however, insubstantial. Both the court of appeals and the district court concluded that this contact had no effect on jury selection.

2. Petitioner also contends (Pet. 13-16) that the court of appeals erred in holding that the district court properly admitted evidence of petitioner's prior arrest. This evidentiary issue was correctly decided and does not warrant further review.

The district court admitted testimony from Deputy Sheriff Ralph Hernandez that on December 5, 1980, he arrested petitioner at a Florida airport after observing him give another person a suitcase that contained seventeen pounds of marijuana. The district court instructed the jury that this testimony "was not to be considered proof of the offense at trial, but for the limited purpose of determining motive, intent, knowledge, absence of mistake" (Pet. App. 4A-5A).

A district court has wide discretion in resolving evidentiary questions. United States v. Abel, No. 83-935 (December 10, 1984) slip op. 9. The district court plainly acted properly in the present case. Rule 404(b) expressly provides that evidence of prior crimes is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Fed. R. Evid. 404(b). In particular, it is well established that evidence of a prior drug transaction is admissible to show a common plan or scheme in prosecutions involving distribution of illegal drugs. See, e.g., United States v. Llach, 739 F.2d 1322, 1327 (8th Cir. 1984); United States v. Smith, 726 F.2d 183, 185-186 (5th Cir. 1984); United States v. McCrary, 699 F.2d 1308, 1311 (11th Cir. 1983). Testimony concerning petitioner's prior arrest was properly admitted for that purpose.

Moreover, the district court's limiting instruction

prevented any prejudice from the evidence. See, e.g., United States v. Llach, 723 F.2d at 1327; United States v. Clemons, 676 F.2d 122, 124 (5th Cir. 1982). The jury is presumed to have followed the court's instruction. See Tennessee v. Street, No. 83-2143 (May 13, 1985), slip op. 5, 7-8; Francis v. Franklin, No. 83-1590 (Apr. 29, 1985), slip op. 16 n.9. Finally, given the ample evidence of petitioner's guilt (see Pet. App. 6A-7A), any error in admitting the evidence would be harmless. See United States v. Hasting, 461 U.S. 499 (1983); 28 U.S.C. 2111. 2/

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari, insofar as it challenges the prosecution's use of peremptory challenges, should be held pending this Court's decision in Batson v. Kentucky, No. 84-6263. In all other respects, the petition should be denied.

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JANUARY 1986

2/ Petitioner observes (Pet. 13) that the court of appeals mistakenly stated that the prior arrest was properly admitted to show petitioner's "propensity" (Pet. App. 4A). This apparently inadvertent misstatement is insignificant in light of the court's subsequent conclusion that petitioner's prior arrest was admissible to show a common plan or scheme (Pet. App. 4A). Given the court of appeals' correct conclusion, its misstatement presents no ground for reversal. Cf. Chevron U.S.A, Inc. v. Natural Resources Defense Council, No. 82-1005 (June 25, 1984) slip op. 4 n.7.

Petitioner also contends (Pet. 16) that the court of appeals departed from a commonly cited rule that evidence of other crimes must be "clear and convincing." The court of appeals did not cite this standard in considering the sheriff's testimony. Nonetheless, it is presumed to have applied the correct standard. See Wainwright v. Witt, No. 83-1427 (Jan. 21, 1985), slip op. 19. Moreover, because the sheriff observed petitioner commit the crime, the standard was met. See United States v. Evans, 697 F.2d 240, 248-249 (8th Cir.), cert. denied, 460 U.S. 1086 (1983).